ELECTION IN INSURANCE CASES.

A few years ago I published an article which ought to have had the effect of revolutionizing the law—or rather of dissipating the confusion—in the United States with reference to waiver in insurance cases. It evidently had no effect of any kind, for in the February number of the COLUMBIA LAW REVIEW I find a well-written article by Mr. George Richards in which all the old troubles are treated as still in existence, and my panacea is unnoticed. I appear to have made the mistake of believing that a single dose of my medicine was sufficient. At all events I know of no other reason for its failure. Let me administer a second.

There has been a struggle between the courts and the insurance companies, and upon the whole the companies have won and made the courts say so, although they had a very bad case. They wanted the courts to declare that their policies insured the payment of premiums rather than the liquidation of losses. They wanted policies that would be alive and active for premium-catching, and quite defunct and extinct—void, they called it—when the premium-payer claimed a loss. The courts saw the iniquity; struggled against it; and failed—failed because they used the wrong weapon. You cannot make much of a hole with a jack-plane, and with waiver you can do very little against the insurance companies. I recommend a trial of election.

Does anybody know what waiver is? I do not. Some years ago I commenced a book upon waiver, wrote several hundred pages, and then observed that what I had done was to put all the waiver cases I had come across into four other departments of the law. I resolved to go no further with my book on waiver until I had found a specimen of the supposed *genus*. I have never yet seen one, and cannot imagine what it will be like if it ever be discovered. What is waiver, seems a very easy question; but will someone tell me whether it is a unilateral or a bilateral act; whether it is something that a man (or an insurance agent) may say to himself in the middle of his morning prayers; or is it something that must be communicated to and acted upon by the other party?

If it has a religious aspect, I bow respectfully and cease my demand for definition; but if it be really bilateral, I believe that every supposed sample can be put in one of four well-known and perfectly respectable categories: Release, Contract, Estoppel, or Election. And the great advantage, of course, of so placing the

cases is that we know something about these departments of the law, whereas we know nothing at all about waiver, except that it has bothered a lot of people who did not know how to exorcise it.

Let me follow Mr. Richards through his difficulties, substituting my brad-awl for the jack-plane. He says (the italics are mine):

"In facing this question it is well to scrutinize the doctrine in practical operation. The usual fire policy provides that the policy shall be void if the insured is not the unconditional and sole owner of the subject matter of insurance, or if he has other insurance, or if he uses certain hazardous articles, or if the insured building stands on leased ground, or if the insured personal property is covered by a chattel mortgage, without written consent or permit endorsed on the policy. It is shown that no such consent is endorsed. It is further proved in each case that the particular condition of the policy called in question, has not been complied with by the insured, *and, consequently, that a forfeiture under the written terms of the policy has undoubtedly been incurred by the insured.* Nevertheless, by virtue of this doctrine of parol waiver, the insured is allowed to testify, on the trial of the action brought to recover the insurance money, that the agent of the company, when he delivered the policy or accepted the premium, had knowledge of the facts constituting the breach of contract. * * * Although a warranty has been broken, *the court evades a forfeiture* by indulging in the inference, or legal fiction, that the parties intended to omit, or ignore, the written condition, or add to the contract the appropriate written consent."[1]

Very properly Mr. Richards declares that, in thus acting, the courts are wrong, and (as he notes) the United States Supreme Court has so declared. He suggests that relief might be obtained in equity—by reformation of the contract—but that, of course, would be applicable only to cases in which proof of mutual mistake could be supplied. Usually, all that the insured can say is, not that the contract as written does not express the contract as agreed to, but that the agent neglected to get the consent required by the contract.

What is to be done in a case of that sort? The policy, we shall say, is five years old; the company knew all the time of the existence of the prior insurance, or the chattel mortgage; but no consent was ever indorsed; and the company pleads forfeiture. Watch my brad-awl bore a hole in the defence. First I challenge the statement

[1] 12 COLUMBIA LAW REVIEW 134, 138.

"that a forfeiture under the written terms of the policy has undoubtedly been incurred by the insured."

Were that true we might, for defence, need waiver or possibly silver bullets. But it is not true. The provision in the policy declaring that the policy shall be "void" if certain things are or are not done, means void *if the party for whose benefit the provision was made—the company—so elects.* It may do as it wishes —cancel the contract or not as it pleases.

If you do not agree with my interpretation of the word *void,* test it by supposing that to an action by an insurance company for the second premium, the assured pleads that according to the policy it was to be void if he brought coal-oil on the premises, and that on the 15th of June he did bring a gallon there. That would not be much of a plea. It lacks precisely what the insurance company's plea always lacks—the allegation, "whereupon the company cancelled the policy."

Misunderstanding of the word *"void"* is one reason for the confusion, in the cases, and another is the misapplication of the word *forfeiture.* It is perfectly correct to say that by a certain act, a man forfeited his life, or that, by re-marriage, a widow forfeited an annuity, for in each case we mean that the effect necessarily followed the act. But when we say that, by non-payment of rent, a tenant forfeited his lease, we really mean that by his omission he gave his landlord an option to cancel the lease. And if the lease were one very onerous to the tenant we should easily recognize that the statement that he had forfeited his lease would be absurd. We associate loss with forfeiture, and, untechnically, we might say that a tenant forfeited a valuable lease, but we should never say that he forfeited one of burdensome character. In reality he forfeited neither one nor the other. He gave the lessor an election to end the lease.

And so in insurance. Why should you use language with reference to a policy that would be misleading with reference to other contracts which provide for their determination by specified options? If the insurance company chooses to cancel the contract you would not say that it had *forfeited* future premiums, nor ought you to say that it had forfeited the assured's rights. It cancelled the contract—that is all. Keep clear of forfeiture. Substitute election to terminate, and many things will become clear.

Having established this point, namely: that the non-indorse-

ment of the consent of the company is not a forfeiture of the policy, but an occasion merely for the cancellation by the company of the contract, I turn upon the company and ask it whether it ever did exercise its option to terminate the policy. That is where the brad-awl hurts, for, of course, the company never did. It was the last thing it could have been induced to do. It had paid good commissions in order to get that policy. The non-indorsement was a matter of the greatest indifference to it. It wanted the premiums, and for five years it collected them. It did not elect to cancel the policy. It elected to maintain it. That is the way to floor the company.

Observe the effect that this view has upon the pleadings: The plaintiff sets out the policy and the loss; the company pleads (1) the condition for avoidance, and (2) the non-indorsement. Then according to present practice, the plaintiff replies waiver. But that is all wrong. The company's plea is bad. It should plead not merely (1) the condition and (2) the non-indorsement, but (3) that in consequence thereof the company exercised its election and cancelled the contract. Without this last allegation the other two are pointless.

That this is undoubtedly true may be seen by supposing that the company pleaded the condition of the policy according to its true meaning—namely, not that the policy was void, but that non-indorsement of consent gave to the company the right to elect to cancel the policy. In that case, very clearly, the plea would be insufficient without an allegation that *thereupon the company cancelled the policy*. And observe that the company having to plead election and cancellation, the plaintiff does not in his reply say anything about waiver. It would be wholly inapplicable and useless. If the company pleads that it elected to cancel, the only reply is that it did not.

The effect of the election idea upon the proof is obvious and beneficial. At present, the plaintiff flounders about at the trial endeavoring to prove (1) that the forfeiture was waived and (2) that the company had given authority for this waiver. Largest sympathy in the jury box frequently fails to supplement the efforts of the perplexed plaintiff, and usually, as a matter of plainest fact, there is no semblance of the necessary authority, since the company produces rules to show that everybody was specifically prohibited from waiving.

Election changes the onus of proof. For the company must

prove (1) that there was an election (2) by an official who had authority to elect. Amongst the regulations of insurance companies, I have never seen one which authorized anybody to elect. If the brad-awl ever gets to work, no company will be without various comprehensive rules containing bestowments of unlimited authority upon everybody to elect—rules intended for ever present aid in time of trouble.

Mr. Richards tells us how the insurance companies were beaten on their "no-waiver" clause—the clause by which they provided that no stipulation of the policy could be waived without a written agreement of the company itself to that effect; and he relates their partial success with their invention of the clause providing that no one had authority to waive:

"In New York and in many states, this policy restriction upon the authority of the agent is respected as to subsequent parol waivers, that is, as applied to transactions occurring after the policy is delivered. * * *"[2]

I beg to suggest that the courts are on the wrong track. Let them ask the companies two questions: (1) Do you say that you elected to cancel the policy? (2) If so, was the act of cancellation a duly authorized act? Rules restrictive of their agents' authority are not what they need. Rules permitting their agents to cancel are what they must produce and prove.

Substitution of election for waiver has another good effect—it terminates the usefulness of the silence-strategy sometimes employed by the companies. At present, some of the courts say that breach of a condition is a forfeiture of the policy, and that a waiver of such forfeiture

"* * * cannot be inferred from its mere silence. It (the company) is not obliged to do or say anything to make a forfeiture effectual.[3] It may wait until claim is made under the policy, and then, in denial thereof, or in defence of a suit commenced therefor, allege a forfeiture. * * *"[4]

If we assume that breach of a condition has forfeited, in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of the breach as well as does the company (usually better) and he knows that his contract is at an end. Then why tell him anything? Silence is sufficient. But if the policy is terminated not

[2] *Ibid.* 141.

[3] What does that mean?

[4] Titus *v.* Glen's Falls Ins. Co. (1880) 81 N. Y. 410, 419.

by the act of the insured, but by the election of the company, notification must be made. Silence is not sufficient.

Other courts are less consistent, but more nearly correct, when they declare that:

"If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared plainly and unconditionally."[5]

For such language assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as I have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect. But if it is the election of the company that is the important factor, then the company has something to communicate, something of great importance to the assured, something of which he can have no knowledge unless it is communicated to him by the company. A good consequence, therefore, of the proposed change is that silence-strategy will be as obsolete as flint muskets, and that the law last quoted will be upheld rather than that which supports the contrary view. If the company wants to cancel the policy it must do so. It cannot have a live policy for premium-catching, and a dead one for loss-dodging.

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[5]United States Life Ins. Co. *v.* Losser (1899) 126 Ala. 568, 584. See also Pollock *v.* German Fire Ins. Co. (1901) 127 Mich. 460.